

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIO MONTROYA,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 291474

Kent Circuit Court

LC No. 08-002742-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

MEMORANDUM.

Defendant pleaded no contest to two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a) (victim under 13) and MCL 750.520c(1)(b) (victim under 13, offender 17 or older). The circuit court sentenced defendant to serve concurrent terms of imprisonment of seven to 15 years for each conviction. Defendant appeals from those sentences by delayed leave granted. We vacate defendant's sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arose from allegations that defendant had manually touched the young victim's vagina four times, two of which involved digital penetration.

At sentencing, defense counsel objected to the scoring of Offense Variable (OV) 13, for which the circuit court assessed 50 points. A challenge to the scoring of that variable constitutes defendant's sole issue on appeal.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

Offense Variable 13 concerns continuing patterns of criminal behavior. MCL 777.43(1). Subsection (1)(a) prescribes a score of 50 points where the offense "was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." But subsection (2)(d) authorizes a score of 50 points "only if the sentencing offense is first degree criminal sexual conduct." In this case, defendant was able to

avoid conviction of CSC I by pleading guilty to charges of CSC II. Because the sentencing offenses were CSC II, not CSC I, the court erred in assessing 50 points for OV 13.

As defendant concedes, a score of 25 points for that variable is appropriate instead, that being the total prescribed where the offense in question “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c).

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). Accordingly, where the guidelines range is adjusted to account for a scoring error, resentencing is required, because such a “misapprehension of the guidelines range” constitutes a sentencing decision “in reliance upon inaccurate information.” *People v Francisco*, 474 Mich 82, 88, 89 n 7; 711 NW2d 44 (2006). See also MCL 769.34(10). Therefore, we vacate defendant’s sentences and remand this case to the circuit court for resentencing.

Sentences vacated, case remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens